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IN THE

Supreme Court of the United States

October Term, 1955

No. 346 and No.

WILLIAM M. TADIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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WILLIAM M. TADIO,

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THE UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States, and to the Associate Justices of the United States:

Petitioner, WILLIAM M. TADIO, the defendant-appellant below, respectfully requests the Supreme Court of the United States to issue Writs of Certiorari herein to review the Judgments of the United States Court of Appeals for the Second Circuit, which affirmed petitioner's convictions of violation of both § 145(b) and § 3809(a) of Title 26; United States Code (1939) under two respective indictments, tried together.

(A) The Opinions Below

The District Court did not render an opinion. The opinion of the Court of Appeals has not yet been officially reported. A copy thereof is appended hereto, as Appendix A (pp. 15-19, *infra*).

(B) Jurisdiction of the Supreme Court

The jurisdiction of the Supreme Court is invoked upon the following grounds:

(i) The judgment of the Court of Appeals was dated and entered on, June 17, 1955.

(ii) On July 12, 1955, petitioner made a timely application to the Court of Appeals for a rehearing under an order of said Court dated June 27, 1955, granting an extension of time therefor until July 18, 1955. The Court of Appeals denied said application by order dated, and entered on, July 26, 1955.

(iii) The jurisdiction of the Supreme Court to review the judgments herein by Writs of Certiorari is conferred by Sections 1 and 2 of Article III of the Constitution of the United States; Section 1254(1) of Title 28, U. S. C.; Rule 37(c) of the Federal Rules of Criminal Procedure; and Rule 22(2) of the Rules of the Supreme Court of the United States.

(C) Questions Presented

In a consolidated prosecution arising out of the same facts under 26 U. S. C. (1939) § 145(b) for willfully evading income taxes, and under 26 U. S. C. (1939) § 3809(a) for willfully making and subscribing false income tax returns:

1. Was petitioner prejudiced where main defense was lack of willfulness, and court erroneously excluded accountant's testimony of advice to petitioner to defer reporting of income until completion of contract, until accountant's third appearance on the stand, and until petitioner took stand, and where court never withdrew its characterization of both petitioner's and accountant's testimony as "improper", "hearsay" and not "competent"?

2. Were repeated errors in charge concerning specific prerequisites to availability of defense of lack of willfulness, cured by final general instructions which did not withdraw prior erroneous specific charges, and where there is some doubt that the final charge was directed to the jury?

3. Are willfulness and intent co-extensive with each element of the crime of willfully making and subscribing false income tax returns under 26 U. S. C. (1939) § 3809(a), so that court erred in charging:

> "A willfully making or signing of the return without willful intent is sufficient * * * It is not denied that the defendant intended to make the tax returns * * * Willfully signing the return is sufficient proof of violation, without proof of other willful intent."?

4. Where Court of Appeals held that trial court committed errors specified in Questions 1 and 2, was it improper to deny a new trial of both indictments on the ground that these prejudicial errors were cured, especially where other prejudicial errors were present?

(D) The Statutory and Constitutional Provisions Involved

Indictment 6255-C (p. 132) charged violations of 26 U. S. C. (1939) § 145(b), which provides:

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this

chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Indictment 6275-C (p. 135) charged violations of 26 U. S. C. (1939) § 3809(a), which provides:

"Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000, or imprisoned not more than five years, or both."

Amended Article V of the Constitution of the United States provides in part:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

(E., G.) Statement

This case came before the United States District Court for the Western District of New York, Knight, C. J., under indictments charging petitioner with willfully attempting to defeat and evade part of the income tax for the years 1950 (count 1) and 1951 (count 2) in violation of 26 U. S. C. (1939) § 145(b) (pp. 132-134);[1] and with willfully making and subscribing a false income tax return for the years 1950 (count 1) and 1951 (count 2) in violation of 26 U. S. C. (1939) § 3809(a) (pp. 135-136).

[1] References are to Appendix pages in the Court of Appeals.

Pursuant to an order dated March 29, 1954, both indictments were consolidated for trial, and were tried together (pp. 1, 4, 5). On May 11, 1954, the jury found petitioner guilty on all counts (p. 152). On June 14, 1954, the trial court denied petitioner's motion for a new trial (pp. 150, 113).

The major item of alleged unreported income arose from a joint venture entered into in 1950 by petitioner (a plumber), one Frank LoBue and two other persons, to furnish and install plumbing in 122 new homes to be constructed by the B. G. King Building Corp. (pp. 159-160). The job was commenced in 1950 and completed in 1953 (pp. 130, 159).

Statement as to Question No. 1

The court erroneously[2] refused to allow one Herman J. Langhans, an experienced accountant, (p. 54) to testify to advice to petitioner that he:

> "Should use the completed job method for reporting the contract proceeds of the 'King' job." (pp. 47, 55.)

The court erroneously characterized the evidence as "improper", "hearsay" and not "competent" (pp. 55-56, 58-59).

Petitioner's counsel sought, in vain, a court ruling on whether the accountant's testimony would be admitted if petitioner took the stand (p. 57).[3] Petitioner then took the stand and testified to this accounting advice (pp. 58-59). The accountant was then called to the stand for the second time (p. 60), but the court again erroneously excluded his

[2] The Court of Appeals so held. See Appendix A, *infra*.

[3] No indication has been found in the record, prior to this error, that petitioner intended to take the stand. The government's opening contained the following improper comment:

"* * * listen to the defendant if he takes the stand * * *" (p. 12).

testimony and branded petitioner's testimony as incompetent, stating:

> "If an objection has *(sic)* been raised to the introduction of that proof it wouldn't have been received. It was received without objection." (p. 58.)
>
> * * *
>
> "* * * although Tadio testified to it it isn't competent." (p. 59.)
>
> * * *
>
> "I won't discuss the law any further I have already passed on it." (p. 59.)

Subsequently, petitioner called the accountant to the stand for the third time (p. 60) and he was allowed to answer some questions concerning his advice to petitioner (pp. 62-67). Neither in the rest of the accountant's testimony (pp. 60-67) nor in the charge (pp. 114-132) did the court expressly instruct the jury that its prior rulings had been changed, and that petitioner's and the accountant's testimony was proper and competent for their consideration. The Court of Appeals held that while exclusion of the evidence was error, it was cured by the accountant's testimony on his third appearance on the stand, after petitioner took the stand. (Appendix A, *infra.*)

Statement as to Question No. 2

One of petitioner's principal defenses was lack of willfulness in that an accountant had advised him to defer the reporting of the income from the long term "King" contract until the termination of the contract in 1953 (see Question 1, *supra*). The court, nevertheless, erroneously[4] conditioned availability of this defense on the proper keeping of satisfactory books of account and upon securing the approval of the Commissioner of Internal Revenue, by charging:

---

[4] The Court of Appeals so held. See Appendix A, *infra.*

"Now the keeping of books of accounting is *a necessary thing* in the determination of *the right* of this defendant to come within the provisions of the law relating to this extended contract. * * * Where books are not kept the tax liability may be determined, *as here,* on a cash basis * * *" (p. 118).

* * *

"The defendant claims that there was a contract that continued for three years and that he was not required to make any return on that until its termination * * * but that procedure can not be adopted unless the taxpayer has kept books of account showing what his income and the profit and loss was. *Let me make it clear* that he has *no right* to adopt the deferment report method unless he did keep books of account in each year showing his income for each year. * * * He has produced no record, however, except the record kept by LoBue, * * * You will see whether it is a competent source from which the proper tax of this defendant could reasonably be learned." (pp. 120-121.)

* * *

"*The law requires* that any change in the method must be approved by the Commissioner of Internal Revenue. *No such approval has been shown here.* * * * The statement that he intends to make a return this year showing the cumulated tax is of *no significance whatever* if you find that he had *legally no right* to make a return on the basis he now seeks to adopt." (p. 123.)

* * *

"If you find that Tadio, the defendant, kept no books reflecting his financial condition or such books from which no accurate computation of the tax could be made, then any claim to the right of the extension of the time of payment *is not to be considered here* because he would *not be entitled to it* but would be required to report each year on another basis." (p. 126.) (Emphasis supplied.) See also pp. 128 and 130.

These charges by the court were duly excepted to (pp. 127, 128 and 130). The Court of Appeals herein held that any misconception "must" have been wiped out by the final

instructions that the defendant is not willful if it is shown that "he in good faith acted contrary to the regulations." (p. 132, Appendix A, *infra.*)

These final words were at the very end of the charge (pp. 131, 132) and were evidently read by the court from a volume handed to him by petitioner's counsel containing the case of Gaunt v. U. S., 184 F. 2d, 284, 291, fn. 4 (p. 131) and there appears some question as to whether the court read this to itself or to the jury. (See written motion for new trial, Point 28, p. 148; and argument on motion for new trial, p. 104.)

Statement as to Question No. 3

The court erroneously instructed the jury on the elements of the crime comprehended by 26 U. S. C. (1939) § 3809(a), as follows:

> "The elements of the crime are:
> 1—Making and signing a return;
> 2—Does *such* acts willfully;
> 3—Signature under the penalty of perjury;
> 4—That the defendant did not believe the return true and correct as to every material matter."
>
> • • •
>
> "The return • • • was *admittedly made and signed* by the taxpayer in his own hand • • • A willfully making *or* signing of the return without willful intent is sufficient." (p. 116.)
>
> • • •
>
> "Ordinarily one *intends* the natural consequences of his act • • • It is not denied that the *defendant intended to make* the tax returns." (p. 121.)
>
> • • •
>
> "• • • the defendant *admits signing* them and the question there is whether the defendant believed his return to be correct. • • • *Willfully signing* the return is sufficient proof of violation without proof of other willful intent." (p. 122.) (Emphasis supplied.)

Statement as to Question No. 4

The statement of the case as to Question 4 herein is adequately covered by the statement as to Questions 1, 2 and 3, *supra*.

(H) Reasons Relied On

As to Question No. 1

Petitioner's main defense was lack of willfulness in that an accountant advised him to defer reporting income from the "King" venture until the termination of the contract (pp. 55, 62). The indictments were for the years 1950 and 1951 (pp. 132-136) and the contract was started in 1950 and completed in 1953 (pp. 159-160, 124). The Court of Appeals correctly held that the trial court erroneously excluded the accountant's testimony (Appendix A, *infra*).

The Court of Appeals incorrectly held that when the accountant was allowed to testify on his third appearance and after petitioner took the stand, that "This cured the earlier error" (Appendix A, *infra*), since:

(i) Petitioner's defense presentation was confused and rendered ineffective.

(ii) Petitioner was forced to take the stand to testify to conversation with accountant or risk a reversible though degrading conviction, in contravention of Amended Article V of the Constitution (Cf. Barshop v. U. S., 192 F. (2d) 699, 700, cert. den. 342 U. S. 920, 96 (Ed. 688).[5]

(iii) Efficacy of accountant's testimony was vitiated by not allowing this testimony until third appearance on stand.

[5] See fn. 3, *supra*.

(iv) The court failed to withdraw its erroneous characterization of both petitioner's and accountant's testimony as "improper", "hearsay" and not "competent", and to clearly instruct jury of its probative nature (pp. 55-56, 58-59).

The subsequent admission of erroneously excluded testimony, is similar to the withdrawal from the jury of erroneously admitted evidence which "cures any error which may have been committed by its introduction * * * yet there may be instances where such a strong impression has been made upon the minds of the jury * * * that its subsequent withdrawal will not remove the effect caused by its admission * * *." *Throckmorton v. Holt,* 180 U. S. 552, 567; 45 L. Ed. 663, 671. To be effective, the withdrawal must be: "with proper instructions from the court to disregard it" (*Hopt v. Utah,* 120 U. S. 430, 438; 30 L. Ed. 708, 711); "distinctly * * * clearly and unmistakably" (*Turner v. American Security & Trust Co.,* 213, U. S. 257, 267; 53 L. Ed. 788, 792); "in direct terms" (*Boyd v. U. S.,* 142 U. S. 450, 457; 35 L. Ed. 1077, 1079) and by an "emphatic direction" and "instructions too clear and positive to be misunderstood by the jury." (*Pennsylvania Co. v. Roy,* 102 U. S. 451, 459; 26 L. Ed. 141, 145.)

Petitioner submits that here, as in *Waldron v. Waldron,* 156 U. S. 361, 382; 39 L. Ed. 452, 459, these errors were such as "* * * to cause the harmful consequences arising therefrom to permeate the whole record and render the verdict erroneous." (See also *Mora v. U. S.,* 190 F. (2d) 749, 752; *Holt v. U. S.,* 94 F. (2d) 90, 94.)

In view of the foregoing, it can not be said that "the judgment was not substantially swayed by the error." (*Kotteakos v. U. S.,* 328 U. S. 750, 765; 90 L. Ed. 1557, 1567.)

As to Question No. 2

The Court of Appeals correctly found that the trial court was "wrong" in specifically and repeatedly charging with respect to petitioner's defense of lack of willfulness that he had "no right to adopt the deferred report method of accounting unless he satisfied the requirements of the Regulations as to keeping books of account and obtaining the consent of the Commissioner * * *" (Appendix A, *infra*). The Court of Appeals was incorrect in holding that the court's final general words about good faith acting contrary to the Regulations "must have wiped out any misconception which the jury may have had from the main charge as to the necessity of compliance with the Regulations" (Appendix A, *infra*), since:

(i) The prior erroneous charges were both specific and repeated (pp. 118, 120, 121, 123, 126, 128 and 130) and the purported cure was general, confusing and unrepeated (pp. 129, 131-132);

(ii) The court withdrew the defense of lack of willfulness from petitioner with such emphatic and specific instructions as "Let me make it clear that he has no right to adopt the deferment method unless he did keep books of account" (p. 120); "the law requires that any change in the method must be approved * * * no such approval has been shown here"; "no significance whatever if you find he had legally no right" (p. 135); "they have to be sufficient" (p. 128) and "he has to keep an accurate record" (p. 130);

(iii) The court at no time withdrew from the jury these repeated specific erroneous charges; and

(iv) The court did not connect the "Regulations" referred to in its final words to the requirements stated in

the main charge of the specific necessity of keeping books of account and securing the Commissioner's approval.

As was stated by this court in *Bollenbach v. U. S.*, 326 U. S. 607, 613; 90 L. Ed. 350, 355:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges * * * is certainly not better than equivocal."

Here the finding of the Court of Appeals as to the cure was only an equivocal holding that the final words "must have wiped out any misconception." "Which of the two statements was received and acted upon by the jury, it is wholly impossible * * * to determine * * *." *Mills v. U. S.*, 164 U. S. 644, 649; 41 L. Ed. 584, 585.

The I. R. C. § 145(b) part of this case was based on the "net worth" method[6] (pp. 118-119, 10), concerning which this court stated in Holland v. U. S., 348 U. S. 121:

> "* * * these pitfalls inherent in the net worth method * * * required the exercise of great care and restraint * * * Charges should be especially clear. * * *"

This court denied the Government certiorari in the similar case of *U. S. v. Martell*, 199 F. (2d) 670, cert. den. 345 U. S. 917; 97 L. Ed. 1350, where the Court of Appeals stated at p. 672:

> "We think the sum total of these instructions was to confuse the jury about what was required * * * No one can know for certain what a given portion of a charge does to the collective minds of the jury * * *."

See *Nicola v. U. S.*, 72 F. (2d) 780, 787; *McFarland v. U. S.*, 174 F. (2d) 538, 539; *Drossos v. U. S.*, 2 F. (2d) 538, 539; *Frank v. U. S.*, 220 F. (2d) 559, 565; *Berkovitz v. U. S.*, 213 F. (2d) 468, 473.

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[6] The charge was confusing and did not instruct as to the two theories involved (pp. 114-132).

Petitioner respectfully submits that the repeated specific erroneous instructions, which were never withdrawn, require a new trial.

As to Question No. 3

The second indictment (pp. 135-136) charged violation of 26 U. S. C. (1939) § 3809(a) in willfully making and subscribing a false return. Specifically denounced here is the willful making *and* subscribing a return not believed to be true and correct as to every material matter. The Trial Court incorrectly charged that either "making *or* signing of the return without wilful intent is sufficient" (p. 116), and "*wilfully signing the return* is sufficient proof of violation, without proof of other wilful intent" (p. 122).

The court then confounded the error and invaded the province of the jury by finding that the return was "admittedly made and signed" by petitioner (pp. 116, 122) and "wilfully signing the return is sufficient proof of violation" (p. 122). See *Berkovitz v. U. S.*, 213 F. (2d) 468.

Clearly, more is required than willfully subscribing the return—a criminal intent is required coextensive with the elements of the crime. *Spies v. U. S.*, 317 U. S. 492, 87 L. Ed. 418; *Morissette v. U. S.*, 342 U. S. 246, 96 L. Ed. 288. Here only the willful act is prohibited and, therefore, a specific wrongful intent is of the essence. *Potter v. U. S.*, 155 U. S. 438, 446; 39 L. Ed. 214, 217; *Hargrove v. U. S.*, 67 F. (2d) 820, 823; and cases therein cited.

While this erroneous charge was not specifically excepted to, it is submitted that such gross error was committed by the trial court that certiorari should be granted. In any event, exception was taken to the court's erroneous rulings on the admissibility of evidence tending to show

lack of willfulness (Question No. 1, *supra*) and to the erroneous charges of the court on the necessity of willfulness and intent (Question No. 2, *supra*). Furthermore, the court did not follow the procedure prescribed by Rule 30 of the Rules of Criminal Procedure in that the written requests to charge were not passed upon prior to submission, and counsel were in doubt as to the court's rulings thereon until the completion of the charge (p. 127).

As to Question No. 4

Petitioner respectfully submits that in view of the findings of the Court of Appeals that the trial court made errors in the exclusion of testimony and in its charge to the jury and where there is grave doubt that said prejudicial errors were cured, and other prejudicial errors were present, a new trial should have been granted on both counts of the indictment.

Conclusion

Petitioner respectfully submits that this case involves important federal questions of a procedural and substantive nature which should be settled by this court and that the Court of Appeals, in finding prejudicial errors cured, has departed from the accepted and usual judicial course of criminal procedure and, in effect, sanctions future departures by lower courts.

Respectfully submitted,

WILLIAM B. MAHONEY,
HYMAN KARNOFSKY,
ARNOLD WEISS,
Counsel for Petitioner.

Buffalo, New York.
August 17th, 1955.

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 332 October Term, 1954.
333

Argued May 13, 1955 Decided June 17, 1955.

Docket Nos. 23356, 23357.

—o—

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM M. TADIO,
Defendant-Appellant.

—o—

Before: HAND, SWAN and FRANK, Circuit Judges.

Appeal from the United States District Court for the Western District of New York, John Knight, Judge.

The defendant appeals from a judgment of conviction under two indictments, tried together, one of which charged evasion of 1950 and 1951 income taxes and the other perjury in filing incorrect returns for those years, and from an order denying a motion for a new trial. Judgment affirmed.

Hyman Karnofsky, Attorney for appellant; James R. Privitera, of Counsel.

John O. Henderson, United States Attorney, for appellee; Richard E. Moot, Asst. U. S. Attorney, of Counsel.

SWAN, Circuit Judge:

The defendant was convicted after trial to a jury of wilfully attempting to evade and defeat payment of his 1950 and 1951 income taxes, in violation of 26 U. S. C. A. § 145(b), and wilfully filing a return for each of those years which he did not believe to be true and correct, in violation of 26 U. S. C. A. § 3809(a). He was sentenced to imprisonment for a year and a day on both counts of each indictment, the sentences to run concurrently, and was fined $2,000 on the first count of the tax evasion indictment. His appeal challenges the sufficiency of the indictments, the sufficiency of the evidence to support the jury's verdict, and errors in the conduct of the trial.

The contention that the indictments are insufficient because they do not allege the defendant's net income merits little discussion. The first count of the section 145(b) indictment alleges that he wilfully attempted to defeat and evade "a large part of the income tax due and owing by him and his wife" for the calendar year 1950, by filing a joint 1040A, short form, income tax return stating their total income to be $2,899.92, and the tax thereon to be $139.00 when he "well knew their joint adjusted gross income" was $9,792.38, "upon which there was owing to the United States of America an income tax of $1,299.24." The second count related to 1951 and was the same as the first except for different figures. An indictment in identical form was sustained in *Heasley v. United States,* 8 Cir., 218 F. 2d 86 with ample citation of authorities. The attack upon the perjury indictment for failure to include the words "net income" is equally unsubstantial. The statute, 26 U. S. C. A. § 3809(a) imposes " the penalties for perjury upon those who wilfully falsify their returns regardless of the tax consequences of the falsehoods." *Gaunt v.*

United States, 8 Cir., 184 F. 2d 284, 288, cert. denied, 340 U. S. 917.

The contention that the evidence is insufficient to support the jury's verdict is fantastic. On such issue the appellate court must view the evidence in the light most favorable to the Government's case, *United States v. Manton,* 2 Cir., 107 F. 2d 834, 839, cert. denied, 309 U. S. 664. The defendant held the office of Plumbing and Building Inspector of the Town of Cheektowaga. He was also engaged in the plumbing business, mostly on small jobs before the summer of 1950, when he and his brother-in-law formed a partnership and made a long term contract with B. G. King Building Corporation for the installation of plumbing in 122 houses at the price of $630 per house. In his 1950 and 1951 income tax returns he reported his salary as Inspector for the Town as his *only* income. He admitted on the stand that on the small jobs "I must have been making a few dollars", and as to receipts from the King contract he told a revenue agent that since he had not reported business income in the past, he feared to start doing so because it would invite an investigation. Much additional evidence also supports the verdict, but it is unnecessary to recite it.

At the trial the principal defense was lack of criminal intent in failing to report receipts under the King contract because an accountant, Mr. Langhans, had advised the defendant to use the "completed contract" method of accounting, i.e. not to report income from the King contract until the job was completed. It was not completed until 1953. When Mr. Langhans took the stand to testify to the giving of such advice in 1950, the trial court at first erroneously excluded his testimony. But after the defendant had himself testified as to his conversation with

Langhans, the latter was recalled and was allowed to testify. This cured the earlier error.

In his charge to the jury the trial judge referred to the defendant's claim that he was not required to make any return as to receipts under the King contract until its completion and emphasized several times that Tadio had no right to adopt the deferred report method of accounting unless he had satisfied the requirements of the Regulations as to keeping books of account and obtaining the consent of the Commissioner to change from the cash basis to the deferred report method of reporting income. In this respect the charge was wrong. The claimed defense bore on the question of criminal intent. If the defendant believed he had the right to use the deferred method, the jury might find he did not "wilfully" evade the tax, whether or not he had the right to use such method. But we think the error was corrected by instructions given at the request of counsel at the conclusion of the main charge. Mr. Privitera requested the court to charge "that if the jury find that the defendant acted upon his understanding of the law, although he was under a misconception, that [sic] it must return a verdict of acquittal." The court replied: "It has to be wilful I will state. It has to be wilful and with intent to violate the law." In reply to a further request Judge Knight said: "It has got to be shown, as I have stated time and time again, it must be wilful. 'He is not wilfully evading a tax if all that is shown is that he made errors of law'. That is true, 'He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury'. I so charge." These were the court's final words to the jury and we think they must have wiped out

any misconception which the jury may have had from the main charge as to the necessity of compliance with the Regulations.

None of the alleged errors in the conduct of the trial is of sufficient importance to deserve discussion. Judge Knight very properly permitted opposing counsel to see the contents of the defendant's trial brief. Nothing prejudicial occurred in admitting or excluding evidence. The claim that he was deprived of a fair trial finds no support in the record.

Judgment affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 346

WILLIAM M. TADIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15-19) is reported at 223 F. 2d 759.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1955 (Pet. 15), and the petition for rehearing was denied on July 26, 1955. The petition for a writ of certiorari was filed August 25, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error when, after first refusing to allow an accountant to testify as to advice given by him to petitioner, it later allowed the testimony.

2. Whether the final words of the court in its charge to the jury, made at petitioner's specific request, pointing out that petitioner was not wilfully evading a tax if he in good faith acted contrary to Treasury Regulations, were sufficient to cure a previous erroneous charge with respect to petitioner's right to report income at the completion of a long-term contract.

3. Whether the trial court committed plain error in instructing the jury on the elements of the crime of wilfully making and subscribing false income tax returns.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in

addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

SEC. 3809 [as amended by Sec. 4(a), Act of August 27, 1949, c. 517, 63 Stat. 666]. VERIFICATION OF RETURNS; PENALTIES OF PERJURY.

(a) *Penalties.* Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3809.)

Federal Rules of Criminal Procedure:

Rule 30. *Instructions.* * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he ob-

jects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On January 29, 1954, a two-count indictment was filed against petitioner in the United States District Court for the Western District of New York charging him with wilful attempts to evade income taxes in violation of Section 145(b) of the Internal Revenue Code of 1939. The two counts charged him with filing fraudulent income tax returns for himself and his wife for the years 1950 and 1951. The amounts of adjusted gross income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 1, 132, 133, 134):

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1950).....	$2,899.92	$139.00	$ 9,792.38	$1,299.24
Count II (1951).....	3,199.92	216.00	14,769.73	2,864.82

On March 2, 1954, a second two-count indictment (R. 4, 135, 136) was filed against petitioner in the United States District Court for the Western District of New York charging him with wilfully filing a return for each of the years 1950 and 1951 which he did not believe to be true and correct, in violation of Section 3809(a) of the Internal Revenue Code of 1939.

After a jury trial on the consolidated indictments, petitioner was found guilty as charged (R. 150) and on June 15, 1954, he was sentenced to concurrent terms of imprisonment for one year and

one day on all four counts and fined $2,000 on count one of the first indictment (R. 152-153). The Court of Appeals unanimously affirmed the conviction. (Pet. 15-19.)

Since the sufficiency of the evidence to support the verdict is not questioned in the petition, it is enough to note here that the court below summarized the evidence (Pet. 17) as showing that the petitioner, the plumbing and building inspector of Cheektowoga, New York, reported his salary on his 1950 and 1951 income tax returns as his only income, whereas he had actually been engaged in the plumbing business during that period; that his plumbing jobs were mostly small before the summer of 1950, at which time he and his brother-in-law contracted to install plumbing for the B. G. King Building Corporation in 122 houses at the price of $630 per house; that he admitted on the stand that he must have been making a profit on the small jobs; and that he told a revenue agent that he had not reported the income from the big contract because he had failed to report business income in the past and feared it would invite an investigation if he began to do so. Petitioner's chief defense was that he had been advised by an accountant that he need not report the income from the King contract until it had been completed in 1953. (R. 55, 58-63, 72-73.)

ARGUMENT

1. Petitioner took the stand at the trial and testified that he had relied on the advice of an accountant, Langhams, in not reporting his profits from the

King contract in 1950 and 1951 (cf. R. 58), and Langhams thereafter testified that he had "suggested" such a course of action to petitioner[1] (R. 60-63). Defense attempts to have Langhams testify to this effect had twice previously been overruled by the trial judge (R. 46-59), and petitioner now contends (Pet. 5-6, 9-10) that his defense of lack of wilfulness was vitiated by these rulings.

There is no merit in this contention. As the opinion below points out (Pet. 17-18), the erroneous earlier exclusion of Langhams' testimony was completely cured when he was ultimately allowed to give the relevant details of his conversation with petitioner.[2] Cases which discuss the prejudicial nature of evidence excluded after having been previously admitted (Pet. 10) have no application here. There is obviously no parallel between

---

[1] It should be noted that while Langhams had been an accountant for many years (R. 54), his principal business was wholesale plumbing and heating (R. 46, 61). Furthermore, his suggestion appears to have been merely incidental to a discussion of the amount of credit to be extended by his firm to petitioner for materials furnished in connection with the King contract. (R. 60-66.)

[2] It is highly doubtful that the original exclusion of Langhams' testimony was erroneous. At that point, there was no evidence in the record to indicate that petitioner's returns were executed in reliance on Langhams' suggstion. The materiality and relevance of the testimony were, therefore, doubtful, and it would seem that the trial judge acted within the limits of sound discretion in excluding it at that time. Cf. *Haigler* v. *United States*, 172 F. 2d 986, 987 (C.A. 10th); *Miller* v. *United States*, 120 F. 2d 968, 970 (C.A. 10th). After petitioner had supplied the link by testifying as to his reliance, the relevance of Langhams' suggestion became clear and the trial judge, after some hesitation, ultimately admitted it. (R. 58-62.)

the effect of highly prejudicial evidence which should never have been heard by the jury, and the effect of favorable testimony which the defense, after being initially balked, eventually manages to get before the jury. The result in the latter case almost inevitably benefits the defendant by highlighting evidence which is helpful to him.

Nor is there merit in the additional contention (Pet. 9) that the trial court's initial exclusion of Langhams' testimony violated petitioner's constitutional privilege by forcing him to take the stand himself. As has been seen (*supra*, p. 6), the initial exclusion was probably correct. Moreover, petitioner did not complain at the trial that the ruling would deprive him of his constitutional right (R. 49-67), and the issue appears to have been raised for the first time in this Court. Under the circumstances, it is logical to assume that neither defense counsel nor the trial judge understood that petitioner's decision to take the stand rested upon the admission or exclusion of Langhams' testimony. *Barshop* v. *United States*, 192 F. 2d 699, 700 (C. A. 5th), certiorari denied, 342 U. S. 920.

Furthermore, the Government's evidence established that, in addition to the unreported income from the King contract, petitioner received almost $9,000 in 1950 and about $12,000 in 1951, a considerable portion of which represented unreported income from small plumbing jobs. (R. 125.) [3] This

[3] The reference is to the trial court's summary of the evidence in the charge to the jury. The testimony as to these figures is not included in the record before this Court, but there was no challenge to the accuracy of the trial court's summary.

evidence, unchallenged by petitioner, would alone have been sufficient to support the verdict.

2. Some passages of the trial court's original charge were susceptible of interpretation as permitting the jury to find that petitioner wilfully failed to report the current income from the King contract in 1950 and 1951, even though he believed in good faith that he was entitled to report all such income in 1953 upon completion of the contract. (R. 118, 120-121, 123, 125-126.) However, in response to objection by defense counsel, this misconception was cleared up, and it was made clear that good faith reliance upon Treasury Regulations would constitute a complete defense. (R. 128-132.) We think it sufficient to quote the trial court's final admonition to the jury, which the court below (Pet. 18-19) found adequate to dispel any misunderstanding (R. 131-132):[4]

> The Court: It charges here, "Wilfully means knowingly, and with a bad heart, and a bad intent". I think I will charge it. It means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. "It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or grossly negligent." Of course, that is not so. It has got to be shown, as I have stated time and time again, it must be wilful.

[4] The trial court was reading from the opinion in *Gaunt* v. *United States*, 184 F. 2d 284, 291 (C.A. 1st), certiorari denied, 340 U.S. 917. There is nothing in the record to justify the assertion (Pet. 8) that these final comments were not actually addressed to the jury.

> "He is not wilfully evading a tax if all that is shown is that he made errors of law." That is true. "He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury." I so charge.

In view of this final specific instruction, to the effect that good faith failure to observe the Regulations does not constitute the wilfulness required by the statute, there is no merit in the contention (Pet. 6-8, 11-13) that the earlier misleading portion of the charge was not cured. "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach* v. *United States,* 326 U. S. 607, 612.

3. Although no pertinent objection was made at the conclusion of the instructions to the jury (R. 127-132), petitioner now complains (Pet. 8, 13-14) that that part of the charge which related the offense alleged in the second indictment, i. e., the making and signing of false returns, permitted the jury to convict him without finding a specific wrongful intent to violate the statute. Concededly some of the language used by the trial court in this respect was confusing. (R. 116.) On the other hand, the jury were clearly told that one of the elements of this offense was knowledge of the falsity of the return (R. 116) and that the question to be decided was "whether the defendant believed his return to be correct" (R. 122). No fur-

ther evidence of wilfulness is required under the language of Section 3809(a) (*supra*, p. 3), and the instruction was adequate in the absence of objection by the defense.

Furthermore, in view of the concurrent sentences imposed on all four counts under which petitioner was convicted, and in view of the lack of substance in petitioner's attack upon his conviction under the tax evasion counts, there is no necessity for a review of the question presented by this section of the petition. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641-642.

CONCLUSION

The decision below is clearly correct, and no conflict of decisions or important question of law is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
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SEPTEMBER, 1955.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 346

WILLIAM M. TADIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONER

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IN THE

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No. 346

WILLIAM M. TADIO,

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v.

THE UNITED STATES OF AMERICA.

REPLY BRIEF

Statement

Petitioner respectfully submits this reply brief in answer to the brief of the United States in opposition to his petition for writs of certiorari herein.

The Government's Brief in Opposition apparently concedes most of the positions taken by the petitioner, but seeks to obviate the effect of the errors by claiming that:

(a) The errors were cured.

(b) The errors were not duly objected to.

(c) The errors were not prejudicial and may have been "helpful".

Further Rules Involved

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 30. Instructions

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Rule 52 (b) Plain Error.

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Reply—Argument

As to Question No. 1

The Government's Brief in Opposition makes the following unsupported claims in an attempt to minimize the prejudice to petitioner caused by the court's erroneous exclusion of the Accountant Langhans' testimony[1] as to deferred reporting advice to petitioner:

[1] In this connection a chronological timetable of this portion of the trial is significant:

(Footnote continued on following page.)

GOVERNMENT'S CLAIMS	PETITIONER'S REPLY
Error was cured by "ultimately" allowing the accountant Langhans to testify on his third appearance on the stand. (G. B. 5-6; f. n. 2)[2]	Court never withdrew its erroneous characterization of both petitioner's and Accountant Langhans' testimony as "improper", "hearsay" and not "competent" and "If an objection has (sic) been raised to the introduction of that proof, it wouldn't have been received. It was received without objection". (pp. 55-56; 58-59) Court in its charge, neither mentioned the accountant Langhans nor his testimony. (pp. 114-132)
Original exclusion of testimony was proper since no sufficient basis was laid until after petitioner himself took stand and supplied "the link". (G. B. 6, f. n. 2)	Jury, court and Government's counsel were apprised that petitioner's main defense was reliance on Accountant Langhans' advice to defer reporting income. (pp. 25-26; 27; 31-32; 55-57) In fact, Government's counsel stated, "* * * the Gov-

(Footnote continued from preceding page.)

May 7, 1954 A. M. (p. 35) Accountant Langhans' testimony excluded on first appearance. (pp. 46-57)

May 7, 1954, A. M. Petitioner's offer of proof re Accountant Langhans. (p. 55)

May 7, 1954, A. M. Counsel's futile inquiry to learn if Accountant's testimony will be admitted if petitioner takes stand. (p. 57)

May 7, 1954, P. M. (p. 58) Petitioner Tadio takes stand and testifies to Accountant's advice. (p. 58)

May 7, 1954, P. M. Accountant Langhans recalled and testimony excluded for the second time. (pp. 58-59)

May 7, 1954, P. M. Court adamantly and finally characterizes testimony of both petitioner Tadio and accountant Langhans as objectionable and not "competent". "Subject to being stricken out if objected to." (pp. 58 & 59)

May 10, 1954, A. M. (p. 59) Accountant Langhans called for third time and allowed to give meager testimony and sharply cross-examined by court. (pp. 60-67)

[2] References "G.B." are to pages of Government's Brief in Opposition.

GOVERNMENT'S CLAIMS	PETITIONER'S REPLY
	ernment is perfectly willing to call * * * Mr. Langhans as witnesses on this factual defense". (p. 32) Requiring petitioner to first take the stand and supply "the link" as advocated by the Government would violate petitioner's rights under Amended Article V of the Constitution of the United States.
Errors of repeated exclusion "almost inevitably benefits the defendant by highlighting evidence which is helpful to him". (G. B. 7)	*Res Ipsa Loquitur*
Accountant Langhans' advice to petitioner was a "suggestion * * * merely incidental to a discussion of the amount of credit to be extended". (G. B. 6; f. n. 1)	The Accountant Langhans also stated that it was more than "suggestion" and a credit discussion: "* * * if I may put it in my own words we are primarily interested in securing business and to secure a job of this nature we are very interested, and we had to know where our money was coming from, and the condition of certain organizations. On such as the B. G. King we try to give advice —" (pp. 65-66). Langhans testified that petitioner agreed that Langhans' advice was "the most logical way to handle this job". (p. 63)
Accountant Langhans' principal business was wholesale plumbing and heating	Langhans testified that he was an accountant since 1926 (p. 54) and that 5 years

GOVERNMENT'S CLAIMS	PETITIONER'S REPLY
and not accounting. (G. B. 6; f. n. 1)	prior to the trial, in 1949, just prior to the giving of this advice, he had gone into the plumbing business. (pp. 46, 54, 65)
"* * * neither defense counsel nor the trial judge understood that petitioner's decision to take the stand rested upon the admission or exclusion of Langhans' testimony." (G. B. 7)	See offer of proof (pp. 55-56) and futile attempt to obtain ruling from court as to whether petitioner's taking stand was a condition precedent to accountant's testimony. (p. 57)

As to Question No. 2

The Government apparently concedes that "passages of the trial court's original charge" were erroneous and subject to "misconception" (G. B. 8) and does not contest that the "alleged" cure, if any, at the termination of the charge, did not refer back to or withdraw any of the prior specific erroneous charges. The actual words of the Court of Appeals were "these were the court's final words to the jury and we think they *must* have wiped out any misconception * * *" (emphasis supplied) (pp. 18-19).

The Government does not dispute petitioner's claim that this final charge was not directed to, or heard by, the jury.[3] It merely states that "there is nothing in the record to justify the assertion * * *" (G. B. 8). There may well be a mistake in the transcript as to this final portion of the charge (pp. 131-132) since on the motion for a new trial, neither the Court nor the Government disputed that the court read to itself from the case of Gaunt v. U. S. (pp. 104; 113; 148; point 28).

[3] Eldon F. Hawley, on the Brief in Opposition herein, for the Government, was present at the trial. (pp. 27, 32).

As to Question No. 3

The Government's Brief states "concededly some of the language used by the trial court in this respect was confusing" but claims "no pertinent objection was made" (G. B. 9).

It was impossible for petitioner's counsel to follow the procedure of Rule 30 of the Rules of Criminal Procedure since the Court did not follow this Rule and handicapped petitioner's counsel by not passing on the written requests to charge prior to giving the charge (pp. 114, 127, 113). Nevertheless, the entire charge of the Court was replete with errors as to both the definition and necessity of intent and willfulness in connection with both indictments. Furthermore, under Rule 52 (b) of the Rules of Criminal Procedure and in the interests of justice, this Court may on its own motion take notice of such plain and gross errors which seriously affect substantial rights and unjustly prejudice petitioner. See U. S. v. Atkinson, 297 U. S. 157, 160, 80 L. Ed. 555, 557; Brasfield v. U. S., 272 U. S. 448, 450, 71 L. Ed. 345, 346; U. S. v. Raub, (C. A. 7) 177 F. (2d) 312, 315-316; U. S. v. Levi, (C. A. 7) 177 F. (2d) 827, 831-832.

Conclusion

Petitioner respectfully submits that for the reasons specified in the petition herein and in this reply brief, this Court should grant writs of certiorari herein.

Dated: Buffalo, New York, September 28th, 1955.

Respectfully submitted,

WILLIAM B. MAHONEY,
HYMAN KARNOFSKY,
ARNOLD WEISS,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 346

WILLIAM M. TADIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In our brief in opposition (pp. 8-9) we pointed out that the trial judge read certain passages from the opinion in *Gaunt* v. *United States,* 184 F. 2d 284, 291 (C.A. 1st), certiorari denied, 340 U.S. 917, in order to make it clear that good faith reliance upon Treasury Regulations would constitute a complete defense, and we stated that there was nothing in the record to justify petitioner's assertion (Pet. 8) that those remarks were not actually addressed to the jury. Petitioner's reply brief (p. 5) asserts that the Government does not dispute his claim that this final charge was not directed to, or heard by, the jury, and notes the fact that Eldon F. Hawley,

whose name appears on the brief in opposition, was present at the trial for the Government.

Mr. Hawley, who was at that time a revenue agent, was present during some portions of the trial, but he has no recollection of having been in the courtroom at the time the jury was instructed. However, the Assistant United States Attorney who presented the Government's case assures us that the entire charge was heard by the jury. The Assistant was asked about this matter during oral argument in the Court of Appeals, and that court was obviously satisfied with his explanation.

Respectfully submitted,

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OCTOBER, 1955

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